

CALIFORNIA COASTAL COMMISSION

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M9b

Filed: August 6, 2001
49th Day: September 24, 2001
180th Day: February 2, 2002
Staff: SFR-LB
Staff Report: September 20, 2001
Hearing Date: October 8-12, 2001
Commission Action:

STAFF REPORT: PERMIT AMENDMENT

APPLICATION NUMBER: A-5-BLC-97-188-A2

APPLICANT: Hearthside Homes

AGENT: Buchalter, Nemer, Fields, and Younger

PROJECT LOCATION: On the Bolsa Chica Mesa adjacent to the City of Huntington Beach overlooking the Bolsa Chica wetlands. Essentially, south of Warner Avenue and landward of Pacific Coast Highway in unincorporated Orange County.

DESCRIPTION OF PROJECT PREVIOUSLY APPROVED: The installation of a temporary pre-construction chain link security fence around the perimeter of the Bolsa Chica Mesa property owned by Hearthside Homes. The chain link fence will be approximately seven feet in height, will be raised six inches above grade, and will be setback fifty feet from the edge of the Bolsa Chica Mesa to allow continued public access. The fence would also be setback fifty feet from Warner Pond.

DESCRIPTION OF AMENDMENT: "After-the-fact" request to modify special condition number three to extend the period of time that the fence may remain to provide security for pre-construction activities. Pre-construction activities are projected to be completed by March 2003.

SUMMARY OF STAFF RECOMMENDATION:

Staff is recommending that the "after-the-fact" request for the proposed amendment to extend the time for the temporary perimeter security fence be **approved**. Four special conditions are proposed as part of the approval of this amendment. The first special condition states that unless specifically altered by this amendment all standard and special conditions remain in effect. Special condition number two requires that the fence be removed and areas disturbed by the fence removal be restored by April 10, 2003. Special condition number two also replaces special condition number 3 of the underlying permit. Special condition number three states that action on this amendment will not constitute a waiver of any public rights that may exist on the property. Special condition number four requires that the applicant submit project plans to the

Commission prior to conducting any activity which may be exempt for a determination on whether it is exempt or not.

Special condition number three (3) of the underlying permit, approved on November 5, 1997 allowed the applicant to undertake one of two options by November 5, 1998. The first option was to remove the temporary perimeter fence within one year of its approval, if the applicant had not obtained a coastal development permit and a grading permit for the mass grading of the Mesa and commenced grading. The second option would have been to apply for an amendment to extend the time that the fence could remain if approved or exempt pre-construction activities could not be completed and these activities needed to be fenced to protect public safety.

The applicant has selected the second option, which is to apply for an amendment to extend the life of the temporary perimeter fence. Special condition three states, in relevant part, that, if ongoing pre-construction activities cannot be completed by a set date and these activities must be fenced to protect public safety “... *the applicant may request an amendment to this permit so that the Commission can consider whether the approved fencing may remain or whether it should be modified to be consistent with the public access provisions of the LCP and the Coastal Act.*” Consequently, the Commission must determine whether the temporary perimeter security fence is still necessary for purposes of public safety related to pre-construction activities and whether allowing the fence to remain is consistent with the public access and recreation policies and other Chapter 3 policies of the Coastal Act.

LOCAL APPROVALS RECEIVED: County of Orange Coastal Development Permit PA 97-0065 issued on May 15, 1997.

SUBSTANTIVE FILE DOCUMENTS: Bolsa Chica Local Coastal Program, County of Orange Coastal Development Permit PA 97-0065, and Coastal Development Permit A-5-BLC-97-188.

EXHIBITS:

1. Vicinity Map
2. Tax Assessor Parcel Map of project area.
3. Site Plan
4. Property Ownership November 2000
5. Project Description submitted by Hearthside Homes.
6. Buchalter, Nemer, Fields, and Younger letter of August 3, 2001
7. Commission letter of July 23, 2001
8. Bolsa Chica Land Trust letter of November 29, 1999
9. Hearthside Homes letter of August 3, 1999
10. Commission letter of July 9, 1999
11. Hearthside Homes letter of July 7, 1999
12. Hearthside Homes letter of June 10, 1999
13. Commission letter of May 11, 1999

14. Hearthside Homes letter of April 16, 1999
15. Bolsa Chica Land Trust letter of April 2, 1999
16. Commission letter of March 5, 1999
17. Bolsa Chica Land Trust letter of March 4, 1999
18. Paone Callahan McHolm & Winton letter of February 19, 1999
19. Commission letter of January 15, 1999
20. Hearthside Homes letter of December 17, 1998
21. Commission letter of December 1, 1998
22. Hearthside Homes letter of November 12, 1998
23. Commission staff report of October 17, 1997

PROCEDURAL NOTES:

1. Coastal Development Permit Amendments

Section 13166 of Title 14 of the California Code of Regulations provides for the referral of permit amendment requests to the Commission if:

- 1) *The Executive Director determines that the proposed amendment is a material change,*
- 2) *Objection is made to the Executive Director's determination of immateriality, or*
- 3) *The proposed amendment affects conditions required for the purpose of protecting a coastal resource or coastal access.*

The Executive Director has determined that the proposed amendment is a material change that would affect the conditions previously required for the protection of coastal resources. Specifically, this amendment requests a modification to special condition number three of the underlying permit. Therefore, pursuant to Section 13166 of Title 14 of the California Code of Regulations, the Executive Director is referring this application to the Commission. If the applicant or objector so requests, the Commission shall make an independent determination as to whether the proposed amendment is material.

2. Standard of Review

The policies of the Coastal Act serve as the standard of review for projects within areas which do not have a certified Local Coastal Program (LCP). However, pursuant to Section 30604(b) of the Coastal Act, once an area has been certified, the standard of review is the certified LCP. Though the Commission certified the Bolsa Chica Local Coastal Program with suggested modifications on November 16, 2000, the County of Orange (County) declined to accept the Commission's suggested modifications on May 8, 2001. Thus, pursuant to Section 13537 of Title 14 of the California Code of Regulations, the Commission's certification lapsed on May 16, 2001. Consequently the Bolsa Chica Local Coastal Program is not certified, and projects such as this amendment request, within the Bolsa Chica LCP area, are subject to the policies of the Coastal Act. However, the Commission's most recent decision (November 16, 2000) on

the Bolsa Chica LCP will be used as guidance on how the Chapter 3 policies of the Coastal Act should be applied to the Bolsa Chica Mesa.

I. STAFF RECOMMENDATION, MOTION, AND RESOLUTION OF APPROVAL:

MOTION:

I move that the Commission approve the proposed amendment to Coastal Development Permit No. A-5-BLC-97-188 pursuant to the staff recommendation.

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in approval of the amendment as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE THE PERMIT AMENDMENT:

The Commission hereby **APPROVES** the proposed coastal development permit amendment for the proposed development and adopts the findings set forth below on grounds that the development as amended and conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act, is located between the sea and the first public road nearest the shoreline, is in conformance with the public access and recreation policies of Chapter 3 of the Coastal Act, and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. SPECIAL CONDITIONS:

1. Prior Conditions

Unless specifically altered by this amendment, all standard and special conditions attached to coastal development permit A-5-BLC-5-97-188 remain in effect in the underlying permit and, where relevant, apply equally to this amendment.

2. Maintenance and Removal of Temporary Fence

The temporary Bolsa Chica Mesa Perimeter fence approved in this permit and the adjacent perimeter trail shall be maintained. The fence (including the concrete footings) shall be removed and the areas disturbed by the fence removal shall be cleaned-up and seeded with native grasses by April 10, 2003. The site shall be returned to the natural condition which existed before the fence was installed. This special condition replaces special condition number three of the underlying permit in its entirety.

3. Public Rights

Coastal Commission approval of this permit amendment shall not constitute a waiver of any public rights that may exist on the property. The permittee shall not use this permit as evidence of a waiver of any public rights that may exist on the property.

4. Pre-construction Activities

Prior to undertaking any activity from which the fence is intended to protect the public (such as, but not limited to, oil well abandonment, oil pipeline abandonment, disking, geotechnical testing, geotechnical trenching, water well abandonment, and water well installation) in the fenced area on the Bolsa Chica Mesa, the applicant shall submit plans of the proposed work to the Executive Director with an explanation of why the applicant believes such work is exempt or is already permitted, for evaluation by the Executive Director to determine if the proposed work is an exempt activity under the Coastal Act, if it is an activity covered under a previously approved permit, or if constitutes development under the Coastal Act and therefore requires that a coastal development permit be issued before the proposed work can be undertaken.

The applicant shall not initiate any on-the-ground activity until the Executive Director confirms in writing that the proposed activity is either exempt or has received prior approval, or a coastal development permit is issued from the Commission.

III. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. PROJECT LOCATION AND AMENDED PROJECT DESCRIPTION

The temporary pre-construction fence is located along the perimeter of the Bolsa Chica Mesa (Exhibits 1,2, and 3). The nearest major intersection to the project site is the

intersection of Warner Avenue and Pacific Coast Highway in the City of Huntington Beach. The project site is south of Warner Avenue and inland of Pacific Coast Highway. The project site is in unincorporated Orange County and is within the Bolsa Chica LCP area. Exhibit 4 shows the overall Bolsa Chica LCP area and the property ownership as of November 2000. The proposed amendment is an “*after-the-fact*” request to extend the time for the temporary perimeter security fence to remain on the Bolsa Chica Mesa.

Special condition number three¹ of the underlying permit allows the applicant, Hearthside Homes, to apply for an amendment to extend the period of time that the temporary perimeter security fence is to remain. Special condition number three required that the temporary perimeter security fence be removed after one year (by November 5, 1998) unless the applicant could demonstrate that approved or exempt pre-construction activities could not be completed within the time period specified and fencing was still necessary for public safety. The applicant asserts² that it has been unable to pursue completion of the pre-construction activities. Hearthside Homes, is consequently requesting “*permission to maintain the fence until pre-construction activities, including completion of archeological mitigation activities, oil well abandonment, water well abandonment, and pipeline abandonment can be completed.*” Based on the time line submitted with this amendment request, the life of the fence would be extended to approximately March 31, 2003.

B. PROJECT BACKGROUND

Hearthside Homes proposes to construct residential units on the Bolsa Chica Mesa. Though Hearthside Homes proposes to construct homes they have not yet applied for coastal development permits to do so. Nevertheless, they are proposing to undertake pre-construction activities such as the removal of existing oil development³, geotechnical testing, and archeological work⁴. To assure public safety and to minimize public intrusion into sensitive areas such as ORA-83 Hearthside Homes proposed the temporary perimeter security fence.

On April 15, 1997, without benefit of a coastal development permit, the applicant constructed the portion of the fence along the applicant’s property line with the Department of Fish and Game from Warner Avenue to the Ecological Reserve overlook. The applicant, after being informed of the requirement for a coastal development permit,

¹ The full text of special condition number three can be found on page 9.

² Hearthside Homes letter of December 17, 1998 attached as Exhibit 20.

³ Continued oil operations at Bolsa Chica was exempted from coastal development permit requirements though a “Resolution of Exemption” (E-2-15-73-71) which the South Coast Regional Coastal Zone Conservation Commission adopted on May 17, 1973.

⁴ Archeological work by the applicant on ORA-83 was approved through coastal development permit 5-89-772 which was approved by the Commission on December 14, 1989. Exhibit 3 shows the area covered by ORA-83 as “Archeological Field Work”.

applied to the County in April of 1997 for a coastal development permit⁵. Following the County's decision to issue a coastal development permit on May 15, 1997, that permit was appealed to the Commission on June 24, 1997 by the Bolsa Chica Land Trust and Commissioners Wan and Pavley.

On August 12, 1997 the Commission heard the appeals. The Commission found that the appeal raised substantial issues and continued with a De Novo hearing. During the De Novo hearing the project applicant orally modified the project description to conform to a fifty foot development setback from the bluff edge and to raise the bottom of the fence to a minimum of six inches to facilitate wildlife migration. In September, the oral project modification was followed up with a written confirmation. The Commission continued the De Novo hearing to the October Commission meeting so that staff could address the three questions raised by the Commissioners at the August hearing. The three questions were: 1) impact of the fence on animal migration, 2) maintenance of the fence, and 3) geologic stability.

Meanwhile, on August 18, 1997, the Executive Director issued an Emergency Permit to relocate approximately 200 linear feet of the existing fence along the Bolsa Chica Mesa facing the Ecological Reserve to conform to the fifty foot development setback of the Bolsa Chica LCP. The fence relocation was completed on August 22, 1997.

On November 5, 1997, the Commission approved the temporary pre-construction security fence with four special conditions (Exhibit 23). Special condition number 2 mitigated the fence's impact on animal migration, geologic stability, and public access. Concerns related to animal migration were resolved by raising the fence six inches above grade. The issue of geologic stability was resolved by requiring that the fence be setback fifty feet from the bluff edge and that its temporary nature would minimize any impact on bluff stability. Public access concerns raised by the project were resolved by requiring that a pedestrian trail be provided and that the fence would be temporary as specified in special condition number three.

Special condition number three, the subject of this amendment request, addressed the maintenance and permanency issues. This special condition required that the applicant properly maintain the functionality of the temporary perimeter security fence. Additionally, this special condition required that the temporary fence be removed within one year if the applicant had not obtained a coastal development permit and a grading permit for the mass grading of the Mesa and commenced grading. However, the special condition also allowed the applicant to apply for an amendment to extend the presence of the fence if approved or exempt pre-construction activities could not be completed and the fence was still necessary for public safety.

C. ANALYSIS OF PROPOSED AMENDMENT

⁵ The Bolsa Chica Local Coastal Program was certified from July 11, 1996 to June 4, 1997. Consequently, the County of Orange was able to issue coastal development permits.

The Commission granted Hearthside Homes a coastal development permit for the pre-construction security fence with the understanding that the temporary security fence would be up for a limited duration: it would either be removed within one year from the approval of the permit (by November 5, 1998); or, if certain circumstances were satisfied, the applicant could apply to amend the permit to allow the fence to remain longer. The applicant disputed this interpretation of the permit and left the fence in place but nevertheless applied for an amendment.

The applicant, Hearthside Homes, principally asserts (letter of November 12, 1998, Exhibit 22) that pre-construction activities which necessitate the presence of the temporary security fence were delayed due to the uncertainties created by the legal challenges brought against the Bolsa Chica Local Coastal Program. According to Hearthside Homes, they believe that the County was not able to issue permits and that the one year deadline for removing the fence only applied while there was a certified LCP. The assertions of Hearthside Homes concerning the rationale for maintaining the fence are also articulated in letters which appear as Exhibits 5, 6, 9, 11, 12, 14, 18, and 20.

Hearthside Homes now proposes to continue with pre-construction activities, and they submitted a permit amendment on July 2, 2001 to extend the life of the fence. The applicant anticipates completing pre-construction activities by March 31, 2003. Staff accepted the application and brought it before the Commission. Consequently, the application of Special Condition 3 is not before the Commission. The only thing that the Commission must determine is whether the proposed permit amendment, to extend the life of the temporary pre-construction security fence, is consistent with Chapter 3 policies of the Coastal Act. Additionally, the Commission will be using its November 16, 2000 decision on the Bolsa Chica LCP as guidance.

1. SPECIAL CONDITION NUMBER THREE

The temporary pre-construction security fence came before the Commission on appeal in June 1997. The coastal development permit issued by the County of Orange, for the temporary pre-construction security fence, was appealed to the Commission by the Bolsa Chica Land Trust and Commissioners Wan and Pavley on the grounds that the proposed temporary fence was inconsistent with the fifty foot development setback required by the Bolsa Chica LCP and thus would result in adverse impacts to coastal access. Specifically, the fence was not set-back fifty from the perimeter of the Bolsa Chica Mesa to allow temporary public access. Additionally, though the fence was characterized as a temporary pre-construction security fence, the fence was approved by the County of Orange without any requirement that it be taken down when no longer necessary for its stated purpose.

The Commission found that the fence raised substantial issue with the Bolsa Chica LCP for the following reasons. First, the temporary fence precluded use of the setback area by the public beyond the minimum time that would be necessary. Next, the Commission found that since the fence would be permitted for an indefinite period of

time, possibly in excess of ten years, that it constituted permanent development inconsistent with the uses allowed within the development setback area. As a final point, the Commission found that the fence as approved by the County of Orange would violate the public access plan approved by the Commission for Bolsa Chica (version of October 9, 1997).

In approving coastal development permit A-5-BLC-97-188⁶ on November 5, 1997, the Commission imposed four special conditions, one of which was special condition number three.

Special Condition Number Three states:

3. Maintenance and Removal of the Temporary Perimeter Fence

The temporary Bolsa Chica Mesa perimeter fence approved in this permit shall be properly maintained. The temporary fence shall be removed no later than one (1) year from the date of approval of this permit if the applicant has not obtained a coastal development permit and a grading permit for the mass grading of the Mesa and commenced grading within this time period.

If approved or exempt pre-construction activities can not be completed within the time period specified above and the applicant concludes that these activities must be fenced to protect public safety, the applicant may request an amendment to this permit so that the Commission can consider whether the approved fencing may remain or whether it should be modified to be consistent with the public access provisions of the LCP and the Coastal Act.

The Commission's rationale for imposing special condition number three, as well as special condition number two, is re-stated below.

"The Commission recognizes that fencing is a physical barrier and that the fencing must be designed to minimize the adverse impacts that the project would have on animal migration, recreational opportunities, and that it be properly maintained. As a consequence, the Commission finds it necessary to impose special conditions to ensure that the fence be: constructed in such a manner that it would not significantly impede the movement of the mammals located on the Mesa by requiring that the base of the fence be six inches above the ground, that it be properly maintained, that it avoid Warner Pond, that it be removed one year after the approval of this permit (if mass grading of the Mesa has not been initiated), that the fence will be aligned along the eastern portion of the property line to assure pedestrian access to the bluff edge from Los Patos Avenue, and that the fence be setback a minimum of fifty feet along the entire bluff edge and that any vegetation obstructing public access be removed so that the current public recreational use of the site can remain on the blufftop."

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A copy of the staff report is attached as Exhibit 23.

.....

“To maintain public access as specified in public access policies of the Coastal Act and as proposed in the Bolsa Chica LCP the Commission finds that it is necessary to impose two related special conditions. The first special condition requires that the temporary fence be constructed along a fifty foot setback from the bluff edge to maintain access on a temporary basis. Additionally that public access be provide from Los Patos Avenue to the Bolsa Chica Mesa blufftop along KREG’s⁷ easterly property line and from Warner Avenue along the westerly property line. Further, the Commission also recognizes that future construction activity will be occurring on the Mesa in the form of mass grading. To minimize the impact of construction activity on public access a second special condition is being imposed. This special condition states that if grading is not initiated within one year, the fence will be removed.

Imposing these special conditions resolves the potential that long term development not in compliance with the public access plan contained in the Bolsa Chica LCP would be allowed. The LCP contemplates internal access through the site in the form of a public park and a public road. Allowing the temporary fence to remain for an indefinite period of time would not comply with the public access plan of the Bolsa Chica LCP. Only as conditioned does the Commission find that the proposed temporary fence is consistent with the Coastal Act regarding public access and implementation of the public access policies of the Bolsa Chica Local Coastal Program.”

To discourage the fence from becoming permanent development, the Commission required that the fence be removed by November 5, 1998 if proposed development (grading) did not proceed in a timely manner. The Commission, however, also recognized that proposed development could be delayed due to unforeseen circumstances and consequently included a provision in special condition number three to allow the applicant to apply for an amendment to extend the time period for the fence.

2. FIRST AMENDMENT SUBMITTAL

On December 17, 1998, after the November 5, 1998 deadline, Hearthside Homes submitted a letter (Exhibit 20) requesting an amendment. Prior to the amendment request being submitted by Hearthside Homes, Commission staff discussed the requirements of Section 13166 of Title 14 of the Code of California Regulations with Hearthside Homes. Section 13166 of Title 14 of the California Code of Regulations requires that Executive Director reject an amendment application which lessens or avoids the intended effect of an approved special condition unless the applicant presents newly discovered material evidence.

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KREG refers to Koll Real Estate Group which has subsequently become Hearthside Homes.

The proposed amendment, to extend the life of the fence was considered to lessen the intent of special condition number three by the Executive Director for several reasons⁸. First, the Commission had authorized the fence for only a limited period of time as a necessary step in implementing the public access and recreation plan of the Bolsa Chica LCP. The applicant failed to comply with the requirement to either remove the fence or to apply for an extension by November 5, 1998, thus allowing the fence to remain in violation of the Commission's dictates.

Second, special condition three provided for amendment requests only under certain, explicit conditions. Specifically, a request to extend the life of the fence was to be allowed only if pre-construction activities could not be completed by a set date and such ongoing activities threatened public safety. Hearthside Homes presented no evidence that either of these conditions was satisfied. To allow the amendment request to proceed despite the absence of these conditions precedent would have lessened the intent of the special condition.

Finally, the applicant failed to provide newly discovered material evidence that would have justified the continued presence of the temporary perimeter security fence beyond the November 5, 1998 deadline. For example, in attempting to justify the continued presence of the fence, the applicant focused solely on the litigation, yet the applicant was able to apply for a coastal development permit and upon its approval install the fence, despite the presence ongoing litigation. This amendment request was rejected on January 15, 1999 (Exhibit 19) pursuant to the requirements of Section 13166 of Title 14 of the Code of California Regulations.

Commission staff from the Long Beach Office subsequently referred the non-compliance with special condition number three to the Commission's Enforcement Staff in February 1999. The Commission's Enforcement Staff issued a letter on June 8, 2001 advising Hearthside Homes to submit an amendment application by July 2, 2001.

3. SECOND AMENDMENT SUBMITTAL

Hearthside Homes submitted a second amendment request on July 2, 2001. This application was determined to be incomplete on July 23, 2001 (Exhibit 7) pending the receipt of "*proof-of-ownership*", mailing labels, a review of pre-construction work that has been completed with what remains to be done, and an alternatives analysis to fencing the entire site. Hearthside Homes responded on August 6, 2001.

Again, Special Condition 3 required that two criteria be satisfied for the applicant to request an amendment. The first criterion, which Commission staff found not to be satisfied by Hearthside Homes' first amendment request, was that pre-construction activities could not be completed by a set date. This time, in response to this requirement, Hearthside Homes responded on August 6, 2001 (Exhibit 6) that archaeological work at ORA-83 is ongoing, and that weather conditions prevented it from being completed by the set date. Because the applicant offered some reasoning

⁸ Commission letter of January 15, 1999, Exhibit 19.

that might, if true, satisfy this criterion, and because staff considered that it was appropriate for this issue to be placed before the Commission, Commission staff filed the amendment request.

However, in terms of the oil well and pipeline abandonment work, the applicant stated: *"Work on this effort, however, has not commenced as a result of the litigation, and subsequent LCP process before the Coastal Commission and County. As the LCP for Bolsa Chica was not certified, and the Coastal Commission action is currently in litigation, the landowner has temporarily postponed initiating the work."*⁹ (Buchalter, Nemer, Fields, and Younger letter of August 3, 2001, Exhibit 6)

To the question of why the fence was not taken down by November 5, 1998, Hearthside Homes responded that archeological work and groundwater well investigations necessitated that the site be fenced for security and safety reasons.

In terms of an alternative fencing scheme, Hearthside Homes asserts that *"A private landowner is under no requirement or obligation, legal or otherwise, to maximize public access to, over and across its private property. Public access exposes the property owner to potential liability for injuries or property damage which could occur on or around the property. ... The fence is set back to provide a 50 feet [sic] corridor along the bluff edge facing Outer Bolsa Bay which permits public access to the State-owned areas of the Bolsa Chica Mesa."* (Buchalter, Nemer, Fields, and Younger letter of August 3, 2001, Exhibit 6)

Under this amendment request Hearthside Homes proposes to maintain the fence in its current configuration until pre-construction activities are completed. Pre-construction activities are projected to be completed by March 31, 2003. This second amendment request, which proposes to extend the life of the temporary pre-construction security fence until March 31, 2003, is the decision which is before the Commission at this time.

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The County of Orange declined to accept the Commission's suggested modifications on May 8, 2001. Additionally, Hearthside Homes filed a lawsuit against the Commission on January 12, 2001.

4. APPROVAL OF AMENDMENT REQUEST

The question of development at Bolsa Chica has been very controversial as evidenced by the degree of public involvement¹⁰ and the number of lawsuits which have been filed. Since the Commission's approval of the Bolsa Chica LCP in 1996 and the fence in 1997, the Commission has recommended significant revisions (through suggested modifications) to the Bolsa Chica development plan as articulated in the LCP in response to court decisions and new biological information.

The Bolsa Chica LCP that was approved in January 1996 and subsequently modified in October 1997 proposed residential development over the entire Mesa and the relocation of the Eucalyptus trees ESHA to the Huntington Mesa. Public access and recreation amenities were to be provided through the establishment of a Mesa Community Park and public trails. The Commission approved the temporary pre-construction security fence as one of the initial activities necessary to prepare the site for the development envisioned by the Bolsa Chica LCP.

On November 16, 2000 the Commission approved a modified Bolsa Chica LCP which incorporated the guidance of the court decisions and new biological information. The Commission's latest decision on the Bolsa Chica LCP is significantly different from the January 1996 and October 1997 decisions in that the recommendation is now to limit proposed residential development to the upper bench of the Mesa and to designate the lower bench as "*Conservation*", which includes the preservation of the Eucalyptus grove in its current location.

As a consequence of Commission's recommendation that the lower bench be designated "*Conservation*" and that residential development be concentrated on the upper bench, the public access and recreation plan was significantly revised. The applicant's request to extend the life of the temporary pre-construction fence will be evaluated based on the Chapter 3 policies of the Coastal Act. The Commission's November 16, 2000 Bolsa Chica LCP decision will be used as guidance to explain how the Chapter 3 policies of the Coastal Act should be applied to the Bolsa Chica Mesa.

In terms of the Bolsa Chica's LCP public access and recreation plan, the Commission's November 2000 decision resulted in the elimination of the Mesa Community Park and various public trails in the lowland immediately below the portion of the Mesa facing the East Garden Grove Wintersburg Channel. However, the public trail from Warner Avenue to the Fish and Game Overlook above Outer Bolsa Bay was retained for purposes of maintaining existing public access. Additionally, a public trail is proposed within the buffer area separating the residential development on upper bench from the "*Conservation*" area on lower bench (Figure 1 on page 15). This proposed trail would be located in approximately the same area as the deleted Mesa Community Park. For the reasons articulated below, the Commission finds the continued presence of the fence to be consistent with policies in Chapter 3 of the Coastal Act, including those

¹⁰ The Commission has received several letters from the public concerning the fence. These letters are attached as Exhibits 8,15, and 17.

relating to public access, and recreation, and habitat, as applied to the Bolsa Chica Mesa in the Commissions latest decision on the Bolsa Chica LCP.

PUBLIC ACCESS AND RECREATION: Because of it's undeveloped state immediately adjacent to urban development, the Bolsa Chica area is utilized by the public for its recreation opportunities. Recreation opportunities include bird watching, viewing of the ocean, hiking, jogging, and walking dogs. Public use of the Mesa may be substantial, and Sections 30210 through 30214 of the Coastal Act mandate that maximum access be provided for all people of the State of California consistent with public safety needs, public rights, private property rights, and the protection of natural resource areas from overuse. Additionally Sections 30221 and 30223 of the Coastal Act mandate that land suitable for coastal recreational uses shall be protected for that use.

In approving the installation of the fence in November 1997 the Commission found that the temporary fence would be consistent with public access policies of the Coastal Act if a perimeter loop trail was provided along the portion of the Mesa facing the Outer Bolsa Bay and the lowland, and public access was provided down the extension of Bolsa Chica Street. This trail would allow the public to continue to access the Department of Fish and Game Overlook and the network of trails in the lowlands adjacent to the East-Garden Grove Wintersburg Flood Control Channel (Exhibit 3).

In adopting the Bolsa Chica LCP in November 2000 (Figure 1 on page 15) the Commission found that, by keeping the trail open from Warner Avenue along the Bolsa Chica Mesa overlooking Outer Bolsa Bay to the Department of Fish and Game overlook and providing a public trail (within the buffer) and a scenic public road along a portion of the upper bench of the Mesa, that the public would be provided with adequate access which would be appropriate given the fragility of the natural resources in the area.

The existing perimeter trail adjacent to the fence conforms substantially to the Commission's most recent decision on Bolsa Chica (in November of 2000). First, it provides the trail from Warner Avenue to the Department of Fish and Game Overlook. Second, it provides access down Bolsa Chica Street and along the portion of the upper bench facing the Bolsa Chica Lowlands (Figure 1 on page 15).

However, the Bolsa Chica LCP public access plan (November 2000) differs in some respects from the Commission's coastal development permit decision of 1997. First, the Commission's November 2000 decision on the Bolsa Chica LCP recommends that the public access to the lower bench of the Bolsa Chica Mesa facing the East-Garden Grove Wintersburg Channel be curtailed (Figure 1 on page 15). Limiting public access has been proposed to protect ESHA areas from increased human intrusion that would result from the conversion of the upper bench from open space to residential. This existing trail connects the Department of Fish and Game Overlook to the upper bench. The Commission's coastal development permit decision of 1997 requires that the perimeter trail in this location be kept open.

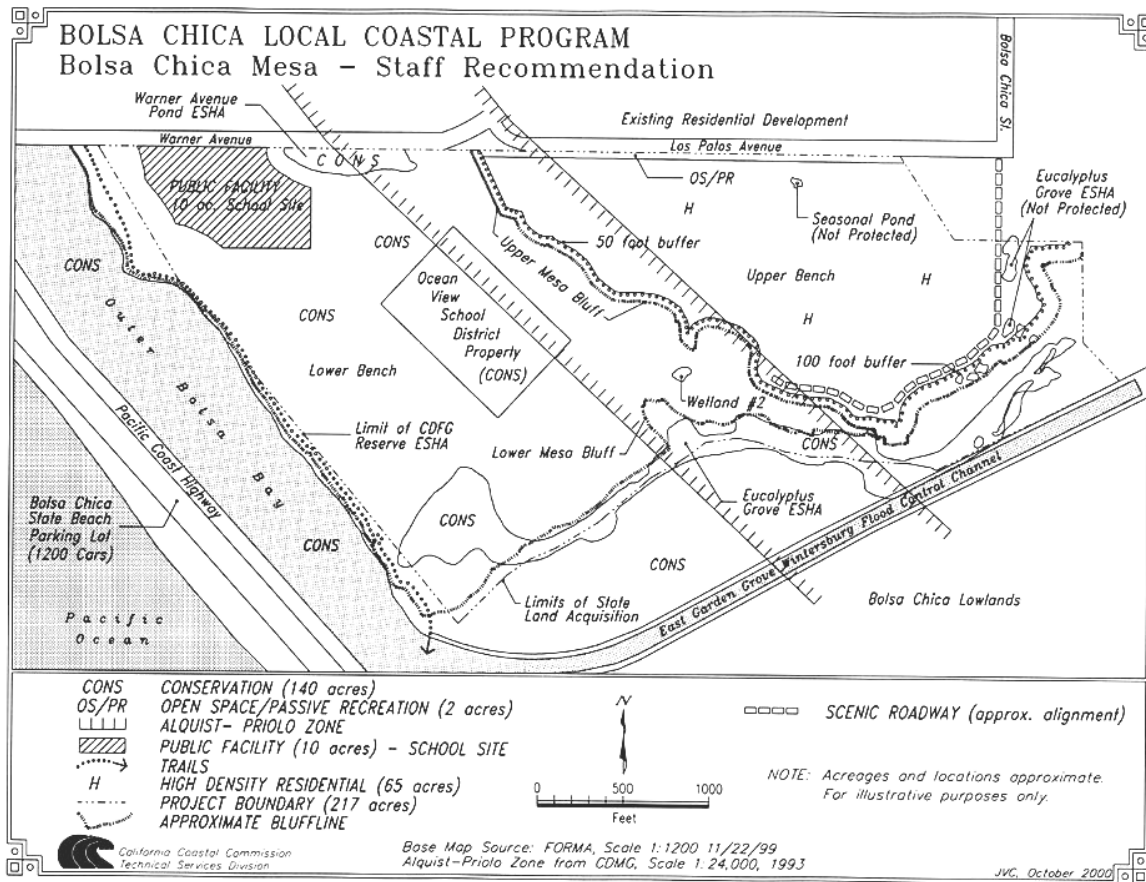
Second, the Commission's November 2000 decision on the Bolsa Chica LCP recommends that a public trail¹¹ be provided within the buffer which separates the upper bench from the lower bench (Figure 1 on page 15). The Commission's coastal development permit decision of November 1997, however, did not require that public access be provided in this area as Hearthside Homes asserted that public access to this area would be inappropriate based on public safety concerns resulting from the necessity to conduct the pre-construction activities which are shown on Exhibit 3. Consequently, public access through this area is precluded by the presence of the fence. Further, Hearthside Homes at this time is not proposing to construct the trail as it is not ready to proceed with the residential development on the upper bench of the Mesa. Therefore, to preserve public access opportunities, the perimeter trail adjacent to the fence must be kept open until the replacement trail shown on Figure 1 is provided.

Though the perimeter trail adjacent to the fence does not fully conform to the Commission's decision on the Bolsa Chica LCP as described above, the Commission finds for the reasons described below that the existing perimeter trail is consistent with the public access and recreation policies of the Coastal Act.

First, Hearthside Homes is not proposing residential development, at this time, which would trigger the requirement that the public trail be provided within the buffer between the upper and lower benches. Also, as no development is presently occurring on the upper bench which would convert it to residential development which would result in the loss of open space and increased human use there is no mandate, at this time to close any of the existing trails. Next, for purposes of public safety related to pre-construction activities Hearthside Homes asserts that the public access must be restricted. Moreover, the existing public perimeter trail (adjacent to the fence) along the southeastern portion of the Mesa is existing. This existing trail provides the public with access to the perimeter of Mesa which could not otherwise be provided if it were closed. To maintain public access and public recreational opportunities consistent with requirements of Sections 30210 through 30214, plus Sections 30221 and 30223 of the Coastal Act, the Commission finds (as a temporary measure to maintain and maximize public access on an already established trail pending the provision of a replacement trail) that the existing public perimeter trail by the fence along the southeast portion of the Mesa must be kept open consistent with the Commission approval in November 1997 of the underlying permit.

Figure 1: COMMISSION ADOPTED BOLSA CHICA LCP LAND USE PLAN (NOVEMBER 2000)

¹¹ The proposed trail is located in an area (as shown on Figure 1) where the public can not currently access due to the fence. The proposed trail is shown by dotted lines, one end begins above the "2" in "Wetland #2" and the other end terminates at "Los Patos Avenue".



As discussed above, the perimeter trail adjacent to the temporary pre-construction fence provides public access around the perimeter of the Bolsa Chica Mesa which allows the public continued opportunities to recreate in the area consistent with the public access and recreation policies of the Coastal Act. Therefore, the Commission finds that as long as the pre-construction fence is temporary and that a perimeter trail is provided, that the presence of the fence is substantially consistent with the public access policies of the Coastal Act, will not have a permanent adverse impact on public access and is consequently consistent with the public access and recreation policies of the Coastal Act.

TEMPORARY NATURE OF THE FENCE: The applicant proposed the temporary fence to protect public safety in the project area while pre-construction activities took place pending mass grading of the Mesa and the eventual construction of residential development, including public parks and public trails. When the Commission approved the temporary fence in November 1997, the Commission was concerned that the fence could remain for an extended period of time if the developers overall development plans were not pursued in a timely manner. For example, the public access plan (Bolsa Chica LCP version October 1997) called for the creation of a Mesa Community Park

and public trails. Thus the fence was an interim measure to protect public safety while activities occurred that would eventually result in substantial improvements, providing the public with public access and recreation amenities. Consequently, leaving the fence up in the absence of any substantial activity towards completing the Bolsa Chica development plan would result in a fence that would be permanent development having and adverse impact on public access. To resolve this concern, the Commission imposed a special condition to require that the temporary fence be removed if mass grading was not initiated within one year. The Commission also allowed the applicant the opportunity to apply for an amendment to extend the life of the fence if the applicant could demonstrate that the presence of the fence was still necessary as it could not complete pre-construction activities by November 5, 1998.

The applicant asserts that pre-construction activities necessitating the fence were delayed for a variety of reasons, principally the litigation brought against the Bolsa Chica LCP. Hearthside Homes, now believes that it can go forward with pre-construction activities which necessitate the continued presence of the fence. A new schedule was submitted on July 2, 2001 (Exhibit 5). According to this schedule oil well and pipeline abandonments are projected to be completed by March 31, 2003. This gives the applicant approximately seventeen months to complete the proposed work.

Though the Commission is approving the extension of time for the temporary pre-construction fence to remain, the Commission continues to be concerned that this fence not remain for an indefinite period of time. The applicant, in 1997, believed that the fence would only be up for one year. Nearly four years have transpired and the fence remains up. By March 2003 the fence will have been up for nearly six years.

The applicant has submitted a new schedule which establishes that pre-construction activities will be completed by March 31, 2003. Based on the applicant's schedule the necessity for the temporary fence will terminate at the end of March 2003. Allowing the temporary fence to remain after March 2003 would result in a protracted adverse impacts to coastal resources inconsistent with the Commission's November 2000 decision on the Bolsa Chica LCP. Specifically the temporary fence blocks access to the proposed trail separating the upper and lower benches as depicted in Figure 1 (page 15). Next, public access to the lowland to the northwest of the East Garden Grove Wintersburg Channel and on the lower bench of the Mesa to the Northeast of the Fish and Game Overlook is to be curtailed to protect this ESHA area from human intrusion. As previously discussed these trails are being kept available for public access on a temporary basis pending the establishment of the trail on the upper bench. To assure that the temporary fence is taken down, the Commission imposes a special condition to replace condition number three of the underlying permit. The new special condition requires that the applicant maintain the temporary fence and adjacent perimeter trail, and that the applicant remove the temporary fence by April 10, 2003. The Commission has selected April 10, 2003 to provide the applicant with a ten day period to remove the fence following the completion of pre-construction activities by March 31, 2003. This revised special condition is consistent with the applicant's proposed schedule and the public access policies of the Coastal Act.

In imposing the requirement that the fence be removed by April 10, 2003 the Commission notes that removal of the fence will result in minor disturbance when the fence fabric, poles, and footings are removed. In approving the Bolsa Chica LCP in November 2000, the Commission recommended that the area be designated "*Conservation*" to protect the habitat of the lower bench. To mitigate any disturbance resulting from the removal of the fence, the Commission is requiring that areas disturbed by the fence removal be cleaned-up of all debris and seeded with native grasses to restore the site to a natural condition. Only as conditioned for the fence removal and restoration of disturbed areas does the Commission find the time extension consistent with the public access and recreation, and environmental protection policies of the Coastal Act.

PRESCRIPTIVE RIGHTS: Public use of the Bolsa Chica Mesa may be substantial, as indicated above. Consequently, the question of prescriptive rights exists. Section 30211 of the Coastal Acts states, in part, that "*development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization.*" In approving the Bolsa Chica LCP, with suggested modifications, in November 2000 the Commission found that the proposed public trail system was equivalent in time, place, and manner to the access made of the site in the past. However, the Commission cannot determine whether prescriptive rights actually do exist, rather, that determination must be made by a court of law. Based on the letters received from the public and staff observations of public use, there may be a valid claim of prescriptive rights. Therefore, since a full prescriptive rights analysis has not been undertaken, the Commission is imposing a special condition which states that approval of this permit amendment does not waive any public rights that may exist on the property. Only as conditioned to clarify that there is no waiver provided does the Commission find that the extension of time for the temporary pre-construction fence is consistent with Section 30211 of the Coastal Act regarding public access.

EXEMPT ACTIVITIES: The applicant, based on the submission materials¹², proposes to remove oil development, conduct geotechnical testing, water well installation, water well abandonment, and complete archeological investigations which the developer believes to be either exempt from coastal development permit requirements or authorized through a previously issued coastal development permit. Consequently, these identified activities are not part of the applicant's project description for this amendment. The applicant's project description for this amendment is solely for the extension of time that the temporary fence would be allowed to remain. Any activity that is considered not to be exempt (qualifies as development under the Coastal Act) must therefore obtain a coastal development permit before it can be undertaken.

Though the applicant believes that the activities described above are exempt, that determination belongs to the Commission. The determination of whether a proposed activity constitutes development under the Coastal Act, is exempt, or is within the scope of an issued coastal development permit is not always an easy decision to make.

¹² Exhibit 3 identifies the pre-construction activities Hearthside Homes proposes to undertake.

Before a decision can be rendered, the details of the proposed project must be evaluated by the Commission.

For example, the definition of "*development*" contained in Section 30106 of the Coastal Act is very broad and contains the phrase "*removal of or harvesting of major vegetation*." That phrase raises the question of what constitutes "*major vegetation*"? The Commission has routinely not required coastal development permits for landscaping in urban areas not adjacent to environmentally sensitive habitat areas, coastal bluff, or coastal canyons. However, the Commission has routinely required permits for landscaping and activities which could impact native vegetation in areas considered to be within or adjacent to environmentally sensitive habitat.

In adopting the Bolsa Chica LCP, the Commission found that the lower bench of the Mesa should be designated as "*Conservation*". The Commission recommended that the lower bench be designated as Conservation as it was habitat necessary to support the raptors which utilize the Eucalyptus Grove ESHA and also because of the presence of Southern Tarplant (*Hemizonia parryi* ssp. *Australis*). Southern Tarplant is a rare annual plant which has had its habitat compromised by urban development. The Bolsa Chica Mesa population is therefore considered significant.

Some of the activities identified by the applicant may be exempt. For example, ongoing archeological work related to ORA-83 is covered by coastal development permit 5-89-772. The removal of oil facilities is covered by "Resolution of Exemption" E-2-15-7371. Though these activities, at first glance, appear to be exempt, there is a possibility that ancillary activities associated with the exempt or permitted activity may require that a coastal development permit be obtained based on the activities' potential to adversely affect the habitat at Bolsa Chica. These activities could include, but are not limited to, access roads and the removal of sensitive vegetation.

For example, geotechnical testing is normally considered to be exempt if it occurs in urban areas and does not have an adverse impact on environmentally sensitive habitat. Geotechnical testing in an environmentally sensitive habitat area, such as the lower bench of the Bolsa Chica, or coastal bluffs could have an adverse impact if access roads are created or if it is conducted on native habitat. Exhibit 3 for example identifies "*access roads*". The applicant asserts that "*it is not our intent to construct new access roads across the property to facilitate geotechnical investigation or other types of pre-construction activities.*"¹³ Though the applicant may not intend, at this time, to construct access roads; the potential still exists that access roads may be necessary when actual geotechnical testing is initiated due to unforeseen problems with accessing particular sites. Grading is defined as development under Section 30106 of the Coastal Act. Therefore, if an access road is determined to be necessary for geotechnical testing a coastal development permit would be required, even if the geotechnical testing itself was considered to be exempt. Furthermore, the site may be periodically disked, which could have an adverse impact on the ability of the lower bench to function as habitat or result in unintentional removal of Southern Tarplant. Section 30240 the Coastal Act

¹³ Exhibit 9, Hearthside Homes Letter of August 3, 1999.

requires that activities adjacent to and within environmentally sensitive habitat areas not have a significant adverse impact on the habitat. Therefore, proposed activities which are to be conducted either adjacent to or within environmentally sensitive habitat areas should be reviewed to assure that the proposed activity will not have an adverse environmental consequence.

Consistent with the requirements of Section 30240, to evaluate the issue of whether a proposed activity is exempt or not based on potential habitat impacts, the Commission is imposing a special condition to require that the applicant submit plans to the Executive Director prior to undertaking any activity. The applicant can not initiate any on-the-ground work until the applicant receives either written confirmation that the work is exempt from the Executive Director or a coastal development permit from the Commission is issued for the proposed activity. The Commission also reiterates that this permit amendment is only for the extension of time that the fence can remain on the Mesa and that the activities shown on Exhibit 3 are for illustrative purposes only. Therefore, only as conditioned for the submittal of project plans prior to the initiation of any activity does the Commission find that the proposed development is consistent with the Coastal Act.

D. LOCAL COASTAL PROGRAM

Section 30604(a) of the Coastal Act provides that the Commission shall issue a Coastal Development Permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program which conforms with the Chapter 3 policies of the Coastal Act.

The County of Orange submitted on June 5, 1995 the Bolsa Chica Local Coastal Program for Commission certification. The Commission at its January 11, 1996 meeting approved the County's submittal with suggested modifications. The County subsequently adopted the Commission's suggested modifications on June 18, 1996. The County's action was reported to the Commission on July 11, 1996. With this certification, the County of Orange assumed coastal development permitting authority for projects in Bolsa Chica. The County issued, on May 15, 1997, a coastal development permit for the fence. The coastal development permit for the fence was subsequently appealed to the Commission. Certification of the Bolsa Chica LCP, however, lapsed on June 4, 1997 when the Superior Court set aside the certification of the Bolsa Chica LCP and required that the Commission reconsider its certification in light of the court's decision.

The Commission, at its October 9, 1997 meeting, approved the Bolsa Chica LCP with suggested modifications. This decision once again became subject of a lawsuit. On April 16, 1999 the appellate court issued a published decision upholding the trial court's decision to grant the petition for writ of mandate. The effect of the appellate court's decision was that the Commission re-heard the Bolsa Chica LCP on November 16, 2000.

The Bolsa Chica Local Coastal Program was approved by the Commission with suggested modifications on November 16, 2000. The County of Orange on May 8, 2001, however, declined to accept the Commission's suggested modifications. Thus, pursuant to Section 13537 of Title 14 of the California Code of Regulations, the Commission's certification lapsed on May 16, 2001.

Consequently the Bolsa Chica Local Coastal Program is not certified, and projects, such as this amendment request, within the Bolsa Chica LCP area, are subject to the policies of the Coastal Act.

Section 30210 of the Coastal Act mandates that public access opportunities be maximized consistent with public safety needs, the protection of natural areas from overuse, private property rights, and public rights. Section 30211 of the Coastal Act mandates that development not interfere with the public's right of access. Section 30240 of the Coastal Act mandates that development environmental sensitive habitat area be protected against any significant disruption of habitat values. To comply with the requirements of the Coastal Act, the temporary pre-construction security fence has been conditioned to provide public access around its perimeter. This allows the public continued recreational opportunities such as bird watching, jogging, and viewing the ocean. The temporary security fence is also consistent with the requirements of Section 30210 and Section 30240 since it minimizes human intrusion into habitat areas and protects them from overuse. Since the temporary pre-construction fence has been found consistent (as conditioned) with the Coastal Act, the proposed development will not prejudice the County's ability to prepare a Local Coastal Program for Bolsa Chica that is consistent with the Chapter 3 policies of the Coastal Act as required by Section 30604(a).

E. CONTINUANCE OF UNPERMITTED DEVELOPMENT

Without benefit of an amendment to its coastal development permit, the applicant has maintained the presence of a temporary perimeter security fence on the Bolsa Chica Mesa. Unless an amendment to the underlying permit was obtained the fence was to have been removed by November 5, 1998.

The applicant asserts that pre-construction activities that necessitated the presence of the temporary perimeter security fence were delayed due to the uncertainties created by the legal challenges brought against the Bolsa Chica Local Coastal Program (LCP). Hearthside homes now believes that it can go forward with the pre-construction activities and requests that the temporary pre-construction security fence remain to protect the public safety.

As articulated in the previous sections, the Commission has found that the fence (as conditioned) is consistent with the public access, recreation, and habitat protection policies of the Coastal Act, as well as all other policies of Chapter 3. Consideration of

the permit amendment application by the Commission has been based solely on the consistency of the proposed development with the policies of Chapter 3 of the Coastal Act.

Approval of this permit amendment application does not constitute a waiver of any legal action with regard to the alleged unpermitted development, nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit.

F. CALIFORNIA ENVIRONMENTAL QUALITY ACT

Section 13096(a) of the Commission's administrative regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project is located in an undeveloped area. Based on the review of extensive biological data much of the lower bench of the Bolsa Chica Mesa was recommended for a "*Conservation*" land use designation by the Commission when it acted on the Bolsa Chica Local Coastal Program on November 16, 2000. Additionally, the Commission recommended that the upper bench of the Bolsa Chica Mesa be designated "*Residential*".

To address the environmental concerns raised by the project, the proposed development has been conditioned as follows to assure that the project will not have a significant adverse impact on coastal resources: 1) that the fence be removed by April 10, 2003 and any disturbed areas be seeded with native grasses, 2) that the Executive Director review any proposed work by the applicant to determine if a coastal development permit is required, and 3) that Commission approval does not waive an prescriptive rights that may exist on the Bolsa Chica Mesa. The proposed development, as conditioned, is consistent with the Chapter 3 policies of the Coastal Act. There are no other feasible alternatives or feasible mitigation measures which would substantially lessen any significant adverse effects the activity may have on the environment. Therefore, the Commission finds that the proposed project is consistent with CEQA and the policies of the Coastal Act.